

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel, W.A. DREW
EDMONDSON, in his capacity as ATTORNEY
GENERAL OF THE STATE OF OKLAHOMA,
et al.,

Plaintiffs,

v.

Case No. 4:05-CV-329-TCK-SAJ

TYSON FOODS, INC., et al.,

Defendants.

**DEFENDANTS' MOTION FOR ENTRY OF CASE MANAGEMENT ORDER
AND INTEGRATED BRIEF IN SUPPORT**

Defendants Tyson Foods, Inc.; Tyson Poultry, Inc.; Tyson Chicken, Inc.; Cobb-Vantress, Inc.; Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; Cargill, Inc.; Cargill Turkey Production, LLC.; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; Simmons Foods, Inc.; and Willow Brook Foods, Inc. (collectively, "Defendants") hereby respectfully request this Court to enter a case management order to facilitate the efficient and orderly progress of this action.

I. INTRODUCTION

Plaintiffs have asserted ten causes of action against thirteen poultry companies alleging wide-ranging environmental injuries resulting from the application of poultry litter as a fertilizer for several decades in an area spanning more than one million acres in two states. Plaintiffs' claims are based on alleged violations of federal and state environmental laws and common law theories of liability such as nuisance and trespass. Plaintiffs seek damages for alleged property damage and environmental harm in Oklahoma arising from conduct that occurred in both Arkansas and Oklahoma. Plaintiffs also seek relief based upon an alleged endangerment to public health and the alleged potential for personal injuries to unspecified residents of Oklahoma.

Moreover, Plaintiffs' claims are phrased in such a broad and vague manner that there is some ambiguity regarding whether Plaintiffs are asserting claims for alleged harm occurring in Arkansas and for alleged endangerment to residents of Arkansas.

Plaintiffs' claims involve complex and difficult issues of injury, causation, and damages which will necessitate much time and resources for discovery. Moreover, the law requires that Plaintiffs' claims must be supported by scientific evidence, and, as a result, expert testimony will be extensive. In addition to the breadth and factual complexity of this case, Plaintiffs have alleged novel legal theories that seek to extend existing environmental laws beyond their traditional application, including beyond the plain language of the environmental statutes under which they seek to recover millions of dollars. Consequently, this case warrants case management by this Court to facilitate the orderly progress and disposition of the matter and to narrow the issues for trial.

The Court has broad discretionary authority to manage the discovery and pretrial scheduling of cases in a manner that befits the unique facts and circumstances of each case. *See* FED. R. CIV. P. 16. The accepted and best way to streamline this case, and to ensure against the unnecessary expenditure of this Court's and the parties' resources, is to sequence the phases of discovery, briefing, and motion practice.

Defendants have conferred with Plaintiffs in a good faith effort to reach agreement on a proposed case management order ("CMO"). Despite the fact that Plaintiffs have represented to this Court that "a comprehensive Case Management Order will assist in the orderly management of this complex case," *see* the parties' Joint Status Report at 6 (Docket No. 372), Plaintiffs have not agreed to Defendants' Proposed CMO attached hereto as Exhibit A. Defendants' Proposed CMO will assist in the orderly management of this complex case and it will protect all parties

from protracted litigation. Therefore, Defendants respectfully request that the Court adopt the Proposed CMO because it is similar to CMOs that have been accepted by courts throughout the country in environmental contamination and toxic tort cases with multiple parties, wide-ranging theories of liability, and complex issues of causation and damages.

Moreover, the Proposed CMO is especially appropriate here. Courts regularly enter CMOs where a plaintiff has failed to produce any *prima facie* proof to support its claims. Although Plaintiffs filed this case more than one year ago, they have vigorously and stubbornly refused to produce evidence legally required to support their claims. The Proposed CMO simply requires Plaintiffs to produce in an orderly fashion basic evidence the law requires.

II. ARGUMENT

A. This Court Has Authority to Enter Case Management Orders

Rule 16 provides courts with broad discretion to enter a scheduling order that addresses any “matters appropriate in the circumstances of the case.” FED. R. CIV. P. 16(b)(6). Rule 16 also provides courts with the authority to use pretrial conferences for the “formulation and simplification of the issues, including the elimination of frivolous claims or defenses” and to address “such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.” *Id.* at 16(c)(1), (16). Likewise, Rule 16 explicitly authorizes the use of special pretrial procedures “for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.” *Id.* at 16(c)(12); *see also* Wright & Miller, 6A Fed. Prac. & Proc. Civ.2d § 1525.

B. Environmental Litigation Requires Case Management

Environmental cases require case management because they frequently involve multiple parties, complex issues of causation, extensive discovery, expert testimony, and scientific

evidence. See the Manual for Complex Litigation (4th Edition, 2005) at § 34.21. In such circumstances, courts regularly enter what is commonly referred to as a “*Lone Pine*” order, which derives its name from *Lore v. Lone Pine Corp.*, a New Jersey toxic tort case against a landfill operator and the generators and haulers of toxic materials to the landfill. See No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986). Defendants’ Proposed CMO is such a “*Lone Pine*” order. The *Lone Pine* court entered a series of case management orders directing each plaintiff to provide “the basic facts plaintiffs must furnish in order to support their claims of injury and property damage,” including facts and expert opinions supporting his or her personal injury and property damage claims. See *id.* at *1-2. The *Lone Pine* court explained that defense counsel “required sufficient information to provide defenses and to determine which of the multiple defendants might have been involved in the alleged dumping of certain chemicals which could have brought about pollution in the area, as well as its effect on the property and persons of the plaintiffs.” *Id.* at *2.

After plaintiffs provided information in response to the CMO, the *Lone Pine* court determined that “the data submitted was woefully and totally inadequate” because the plaintiffs failed to provide any “evidence of contamination of plaintiffs’ properties and no evidence that any such contamination is causally related to” defendants. *Id.* at *3. The *Lone Pine* court found that “defendants were no better off at the end of the seven months allowed plaintiffs to substantiate their cases than when the suit was instituted,” and that “[s]ixteen months after the start of the suit, plaintiffs’ counsel has failed to provide anything that resembles a *prima facie* cause of action” based upon the alleged contamination. *Id.* at *3. The court rejected the plaintiffs’ excuses for not having any expert support for their claims, stating that in “such a case

as this, preliminary expert reports should have been obtained prior to filing suit.” *Id.* In light of the plaintiffs’ inadequate responses, the court concluded that:

With the hundreds of thousands of dollars expended to date in this case, it appears that plaintiffs’ counsel is moving things along without complying with discovery orders, hoping that some of the defendants, to avoid further delay and expense, would recommend a settlement of the case. However, there is nothing to be settled because there is total and complete lack of information as to causal relationship and damages.

Id. at *4. As a consequence, the court dismissed plaintiffs’ action with prejudice, declaring that it was “not willing to [allow plaintiffs to] continue the instant action with the hope that the defendants eventually will capitulate and give a sum of money to satisfy plaintiffs and their attorney without having been put to the test of proving their cause of action.” *Id.*

C. This Court Should Enter a *Lone Pine*-type Case Management Order

The circumstances of this case are similar to those in *Lone Pine*. This Court, therefore, should enter a similar CMO. Despite the fact that Plaintiffs filed their original Complaint against the poultry companies more than fifteen months ago, they have obstinately refused to disclose or identify even the most “basic facts plaintiffs must furnish in order to support their claims of injury and property damage.” *See Lone Pine*, 1986 WL 637507, at *1-2. As in *Lone Pine*, more than one year has passed since the filing of Plaintiffs’ Complaint and “[P]laintiffs’ counsel has failed to provide anything that resembles a *prima facie* cause of action” to support Plaintiffs’ vast allegations of contamination. *Id.* at *3. Moreover, like *Lone Pine*, this case involves complex environmental matters for which “preliminary expert reports should have been obtained prior to filing suit.” *Id.* at *3.

Like the court in *Lone Pine*, this Court should refuse to allow Plaintiffs to drag out this case without demonstrating that they have viable claims in the hopes “that some of the defendants, to avoid further delay and expense, would recommend a settlement of the case.”

Lone Pine, 1986 WL 637507, at *4. Like the court in *Lone Pine*, this Court should enter a CMO requiring Plaintiffs to identify and produce the *prima facie* evidence and proof required as a matter of Oklahoma (and Arkansas) law to support each claim asserted against each Defendant. *See, e.g.*, Exhibit A.

State and federal courts have used *Lone Pine*-type orders in complex cases involving: (1) multiple plaintiffs; (2) multiple defendants; or (3) complex issues of causation and injury. *See, e.g., Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000); *In re Jobe Concrete Prods.*, No. 08-01-00351-CV, 2001 WL 1555656, at *2 (Tex. App. Dec. 6, 2001). Courts enter similar case management orders: (1) to manage or reduce potentially burdensome or extensive discovery; (2) to allow for the early dismissal of meritless claims; (3) to provide notice to the court and the defendants of plaintiffs' claims; (4) to facilitate the management of the court's docket; (5) to help address complex causation issues; and (6) to prevent plaintiffs from seeking to delay having to prove their cases in the hopes of extracting settlements from defendants seeking to avoid the costs of continuing litigation. *See, e.g., William A. Ruskin, Prove it or Lose it: Defending Against Mass Tort Claims Using Lone Pine Orders*, 26 AM. J. TRIAL ADVOC. 599, 601-09 (2003). All these criteria are present in this case.

Simply put, such case management orders are "designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation." *Acuna*, 200 F.3d at 340; accord Scott A. Steiner, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 HASTINGS W.N.W. J. ENVTL. L. & POL'Y 71, 85 (1999); William A. Rushkin, *Prove It or Lose It: Defending Against Mass Tort Claims Using Lone Pine Orders*, 26 AM. J. OF TRIAL ADVOC. at 604.

1. *Lone Pine*-type Case Management in Property Damage Cases

Courts have used *Lone Pine*-type case management orders in property damage cases to require plaintiffs to come forward with: (1) facts regarding the property, including the location of the property, its primary use, and the plaintiffs' ownership interest; (2) a basis for claiming any injury, including timing and degree of the injury; (3) evidence and proof regarding the entry of chemicals or substances on to the property, if any; and (4) evidence regarding the source of any chemicals or substances on the property. *See, e.g., In re Jobe Concrete Prods.*, 2001 WL 1555656, at *3; *Lone Pine*, 1986 WL 637507, at *2. Courts also frequently require the submission of a verified expert statement supporting plaintiffs' causation theory for property claims. *See id.*; *Acuna*, 200 F.3d at 340.

The Proposed CMO would require Plaintiffs to produce these basic facts and proof in an orderly fashion. Significantly, such proof is simply the burden of proof that any plaintiff must satisfy to maintain and prove the tort claim asserted. *See, e.g., Twyman v. GHK Corp.*, 93 P.3d 51, 61 (Okla. Ct. App. 2004) (judgment for defendant is proper when plaintiff fails to establish a causal nexus between defendant's conduct and plaintiff's alleged injury); OKLA. UNIFORM JURY INST. NO. 3.1 ("A party who seeks to recover on a claim . . . has the burden to prove all elements of the claim . . ."); *accord Union Pacific R.R. Co. v. Sharp*, 952 S.W.2d 658, 661 (Ark. 1997) (plaintiff seeking to recover under tort theory of recovery must establish that defendant's actions were the cause of plaintiff's alleged injuries). For example, Plaintiffs have asserted multiple claims against the Defendants for alleged injury to more than one million acres of the Illinois River Watershed ("IRW"). *See* FAC at ¶ 22. However, neither the FAC nor Plaintiffs' discovery responses identify the exact locations of alleged contamination within the IRW, the

specific identity of each substance allegedly causing injury,¹ proof that poultry growers and not other numerous probable sources of the alleged contaminants are the source of the alleged injuries, or which poultry grower's conduct caused the release of any substance allegedly causing these injuries. This type of evidence is essential to Plaintiffs' claims. *See, e.g., Twyman*, 93 P.3d at 61 (plaintiffs must provide expert evidence that defendant was responsible for substance that caused plaintiff's alleged harm); *Union Pacific R.R. Co.*, 952 S.W.2d at 661.

The Proposed CMO also requires Plaintiffs to set forth or produce basic facts and proof such as: the bases of their asserted ownership of the subject properties and natural resources; the bases upon which Plaintiffs assert there has been injury to property and natural resources within the IRW (*e.g.*, the location of the alleged injuries and all sampling data, laboratory analyses, and other objective proof demonstrating the presence of a substance that can be attributed to specific poultry growing operations); and evidence supporting a causal connection between specific poultry grower's conduct and the alleged injuries. *See, e.g., Christian, III v. Gray*, 65 P.3d 591, 601 (Okla. 2003) (expert evidence necessary to determine whether substances from defendants' operations caused plaintiff's alleged injuries from contaminated groundwater).

By requiring Plaintiffs to produce *prima facie* evidence supporting each of their claims against each Defendant, the Proposed CMO is consistent with the purposes of *Lone Pine*-type orders because it will provide notice to Defendants of Plaintiffs' claims and allow this Court: (1) to manage or reduce the extensive discovery required by Plaintiffs' claims; (2) to identify claims for which Plaintiffs have no support; (3) to facilitate the management of the court's docket; and (4) to set an orderly approach for addressing the complex causation issues. *See, e.g.*,

¹ Instead, Plaintiffs have only identified general types of "constituents" such as: phosphorus/phosphorus compounds; nitrogen/nitrogen compounds; arsenic/arsenic compounds; zinc/zinc compounds; copper/copper compounds; hormones; and microbial pathogens. *See* FAC at ¶ 58.

William A. Ruskin, *Prove it or Lose it: Defending Against Mass Tort Claims Using Lone Pine Orders*, 26 AM. J. TRIAL ADVOC. at 601-09. In addition to promoting judicial economy and efficiency, entry of the Proposed CMO will also serve fundamental notions of fairness by protecting Defendants from having to engage in long and expensive discovery to defend themselves against claims that have no evidentiary support, or from preparing a defense to claims that Plaintiffs do not actually intend to pursue to trial or cannot pursue to trial. *See id.*

2. Lone Pine-type Case Management in Personal Injury Cases

In addition to Plaintiffs' property damage and environmental claims, the FAC contains vague allegations of endangerment and harm to public health. *See, e.g.*, FAC at ¶¶ 58, 95, and 100. The vagueness of these claims and the lack of specificity regarding the endangered or injured parties and the harms they allegedly have suffered is exactly why the Proposed CMO is warranted.

In personal injury cases, courts have required each plaintiff to provide a personal statement of the factual bases upon which he believes he was exposed to a particular substance, and an affidavit or report from a qualified expert stating the nature of each plaintiff's injuries, the purported cause of the injury, and a statement that connects the chemical or substance to the plaintiff's injury. *See Acuna*, 200 F.3d at 338 (requiring plaintiffs to submit expert affidavits with specific facts regarding plaintiffs' injuries and establishing that their exposure to uranium mined by defendants was the cause of their injury or illness); *Lone Pine*, 1986 WL 637507, at *2 (requiring plaintiffs to come forward with the basic facts supporting their claims of injury and causation, and to submit expert statements supporting their claims).

Courts use *Lone Pine*-type case management orders in cases (such as this) alleging environmental contamination and related health effects. *See, e.g., Grant v. E. I. Du Pont De*

Nemours & Co., 1993 WL 146634, at *1-2 (E.D.N.C. Feb. 17, 1993) (in a toxic tort case alleging groundwater contamination, trial court issued a detailed CMO requiring plaintiffs to provide an affidavit of a competent expert witness specifying the nature, duration, and level of contamination on each plaintiff's property allegedly causing each plaintiff's injury); *In re Love Canal Actions*, 547 N.Y.S.2d 174, 177-79 (N.Y. 1989) (in mass tort action involving Love Canal landfill, trial court issued *Lone Pine* order to promote judicial efficiency, to dismiss meritless claims, and to prevent plaintiffs from forcing a settlement by threatening continued litigation of baseless claims).

Entry of the Proposed CMO will provide Defendants with such basic information as the type of human health risks and potential for personal injuries Plaintiffs allege have been caused by substances allegedly released from specific poultry growing operations; the persons adversely affected by exposure to such substances; and the locations of such exposures. This information should be readily available to Plaintiffs as part of their pre-suit investigation.

3. Penalties for Non-Compliance With Case Management Orders

In addition to identifying facts and proof that must be produced, case management orders frequently include mechanisms to enforce the timely completion and submission of the required evidence and information. Such enforcement mechanisms encourage all parties to avoid gamesmanship and to produce relevant facts and proof in a timely manner regardless of whether the mechanisms are ever triggered.

For example, *Lone Pine* orders often provide for the dismissal of claims for which plaintiffs fail to disclose evidence or facts, or if they submit inadequate responses (*e.g.*, failure to submit required expert reports). *See, e.g., Acuna*, 200 F.3d at 341; *Lone Pine*, 1986 WL 637507, at *4. *Lone Pine* orders also typically provide defendants the opportunity to challenge the

sufficiency of evidence disclosed by each plaintiff through a motion for summary judgment. Courts may dismiss a plaintiff's claims or grant summary judgment for the defendant if the plaintiff (1) provides vague, conclusory, or evasive responses to the *Lone Pine* order, (2) fails to submit required affidavits or expert reports, or (3) submits overly general affidavits or expert reports that do not specifically link the plaintiff's injuries to the defendant's activities. *See, e.g., Acuna*, 200 F.3d at 340-41 (dismissing claims because plaintiffs' affidavits were vague and did not address whether the injuries alleged by plaintiffs were caused by the specific exposure at issue in the case); *Lone Pine*, 1986 WL 637507, at *4 (dismissing plaintiffs' claims after plaintiffs could not find an expert to state that there was a connection between plaintiffs' injuries and exposure to substances originating from a defendant); *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 333-335 (9th Cir. 1993) (affirming trial court's grant of summary judgment because plaintiffs' expert reports failed to demonstrate a *prima facie* showing of causation necessary to support medial monitoring claims); *Martinez v. San Antonio*, 40 S.W.3d 587, 592-95 (Tex. Ct. App. 2001) (affirming trial court's grant of summary judgment because plaintiffs' expert testimony was unreliable and failed to rule out alternative sources of exposure and causation); *Atwood v. Warner Elec. Brake and Clutch Co.*, 605 N.E.2d 1032, 1038 (Ill. App. 1992) (affirming summary judgment because plaintiffs failed to provide evidence required by case management order); and *Schelske v. Creative Nail Design, Inc.*, 933 P.2d 799, 802-05 (Mont. 1997) (affirming summary judgment because plaintiffs failed to comply with case management order requiring disclosure of *prima facie* evidence).

IV. CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court provide case management procedures for the instant matter by:

1. entering a CMO in the form proposed by this Motion, and attached for purposes of reference as Exhibit A;
2. providing Plaintiffs with notice that failure to comply with the terms of the Court's CMO may result in the dismissal of certain claims or in entry of judgment in favor of Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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